

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF WEST VIRGINIA
MARTINSBURG**

ROBERT FRY,

Petitioner-Defendant,

v.

**Civil Action No. 3:13-cv-19
Criminal Action No. 3:09-cr-78
(Bailey)**

UNITED STATES OF AMERICA,

Respondent-Plaintiff.

**ADDENDUM TO MEMORANDUM OPINION AND REPORT AND
RECOMMENDATION**

The undersigned Magistrate Judge issued a Memorandum Opinion and Report and Recommendation in this action on July 7, 2014 (DE 111) recommending Fry's Motion To Vacate under 28 U.S.C. §2255 be denied.

On July 17, 2014 Fry filed a response correctly pointing out that on June 27, 2014 the Fourth Circuit held in United States v. Henriquez, (2014 WL 2900935, 4th Cir. June 27, 2014) "A Maryland conviction of first degree burglary cannot constitute a crime of violence." (DE 113.) The undersigned did not consider Henriquez. Fry's claim or Ground Two asserts: "State burglary charge that sentencing Judge used as part of sentence enhancement was not a crime of violence since dwelling was not occupied at time of burglary. Therefore, the district court improperly used a state conviction, for what that state (Maryland) holds to be a non-violent crime , to justify a 'career offender' enhancement and thereby subjecting petitioner to a longer and unreasonable sentence..."

Accordingly, the undersigned's prior report and recommendation must be viewed in light of the ultimate outcome of the Henriquez case and if the decision, as rendered stands, Fry's motion should be **GRANTED INsofar ONLY AS IT SEEKS RESENTENCING.**

Within **fourteen (14) days** after being served with a copy of this report and recommendation, any party may file with the Clerk of Court written objections identifying those portions of the recommendation to which objection is made and the basis for such objections. A copy of any objections shall also be submitted to the John Preston Bailey, Chief United States District Judge. Failure to timely file objections to this recommendation will result in waiver of the right to appeal from a judgment of this Court based upon such recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984), cert. denied, 467 U.S. 1208 (1984).

The Court directs the Clerk of the Court to provide a copy of this Addendum To Memorandum Opinion and Report and Recommendation to all counsel of record as provided in the Administrative Procedures for Electronic Case Filing in the United States District Court for the Northern District of West Virginia. The Court further directs the Clerk of the Court to mail a copy of this Report and Recommendation to the *pro se* Petitioner Robert Fry.

DATED: August 4, 2014

John S. Kaull

JOHN S. KAULL
UNITED STATES MAGISTRATE JUDGE